



Arbitration CAS 2017/A/5104 Apollon Limassol v. UC Sampdoria, award of 19 December 2017

Panel: Mr Murray Rosen QC (United Kingdom), President; Mr Marco Balmelli (Switzerland); Prof. Massimo Coccia (Italy)

Football

Transfer fee

Payment of transfer fee despite transfer not being executed

In circumstances where a transfer contract foresees payment of a transfer fee by the club purchasing a player but does not foresee any clause under which the transfer may be avoided or suspended, the purchasing club cannot refuse payment of the transfer fee if following the conclusion of the transfer agreement it decides to not execute the transfer of the player in question.

I. PARTIES

1. Apollon Limassol (“Apollon” or the “Appellant”) is a professional football club founded in 1954 and competing in the Cypriot First Division. It is a member of the Cyprus Football Federation, affiliated to the world governing body, Fédération Internationale de Football Association (“FIFA”).
2. UC Sampdoria (“Sampdoria” or the “Respondent”) is a professional football club founded in 1946 (by a merger of clubs going back to the 1890s) and competing in the Italian Serie A. It is a member of the Italian Football Federation (Federazione Italiana Giuoco Calcio or “FIGC”) also affiliated to FIFA.

II. FACTUAL BACKGROUND

3. The Panel has taken account of all the evidence and contentions of the parties and the following summary serves as an introductory context for its reasoning, additional facts being referred to (if and where necessary) in the legal discussion below.

A. The Player

4. This dispute arises from a written agreement signed on or about 25 February 2015 but dated 1 August 2015 between Apollon and Sampdoria (“the Transfer Contract”) relating to the football player F. (“the Player”).

5. The Player was born in May 1996 and is of Cameroonian nationality. As from January 2014 he played for and was registered with Apollon.
6. The Player was the protégé of a more senior and celebrated Cameroonian footballer, S., who played for and was registered with Sampdoria from January 2015. Both players were advised by a sports agent called G.

B. The Transfer Contract

7. The Transfer Contract (in respect of which G. also advised Apollon) was in Italian and English, the Italian to prevail in the event of any conflict (clause 8).
8. By clauses 3 and 4 of the Transfer Contract Apollon sold and transferred to Sampdoria and Sampdoria received and purchased, in each case “onerously and on a definitive basis” all the rights to the Player, in consideration of (a) payments of EUR 500,000 within 15 days of the “TTC” (International Transfer Certificate) and EUR 500,000 by 31 January 2016, and (b) certain bonuses depending on number and type of matches played and a percentage of any profit made by Sampdoria by selling on the Player.
9. Under clause 5 of the Contract, Apollon and Sampdoria undertook a number of obligations to give effect to the said transfer of the Player and the release of the ITC, including:
 - (a) under clauses 5.1 and 5.4, on the part of Apollon, immediately to sign the necessary documents and enter transfer instructions into the FIFA Transfer Matching System (“TMS”) according to the FIFA Regulations on the Status and Transfer of Players (“RSTP”);
 - (b) under clause 5.3, on the part of Sampdoria, immediately to enter transfer instructions, documents and data into the TMS; and
 - (c) under clauses 5.2, 5.5 and 5.6, on the part of both, to use TMS, immediately to release necessary information and cooperate to get the ITC.
10. By clause 6 of the Transfer Contract, it was stated (in the English) to be “*conditioned to the release by [FIGC] of the registration as professional player of the Player*”.
11. By clause 7 of the Transfer Contract, any dispute between the parties was to be decided by FIFA bodies (or in case of “fault of competence” on their part, by CAS).

C. Sampdoria’s dealings

12. On or about 21 March 2015, Sampdoria sent to G. a form of contract for the Player approved by Italian Serie A for the 2014/15 season, to cover his employment from 1 July 2015 to 30 June 2019 at a yearly salary of EUR 270,000 plus certain bonuses (“the draft Employment Contract”).
13. In mid May 2015, the Player trained for a few days with Sampdoria, which also provided him with a summer training programme.

14. By a letter to Apollon dated 19 May 2015, Sampdoria referred to the Contract and agreed that in addition to the purchase price for the Player, it would pay his monthly salary for February to May 2015 in the total sum of EUR 40,000 and reimburse Apollon in respect of the same within 15 days from the receipt of the ITC.
15. By an email dated 20 May 2015, G. asked Sampdoria for a signed copy of the four-year employment contract for the Player.
16. At some stage, the Player signed the Transfer Contract and the draft Employment Contract. There is an issue as to whether and when the signed draft Employment Contract was submitted to Sampdoria.

D. Performance of the Transfer Contract

17. At about the end of June 2015, S.'s employment by Sampdoria was terminated early by mutual consent and thereafter Sampdoria raised concerns that it did not have enough places for non-European players in its squad to allow for the Player, and he did not train further with it.
18. By a signed agreement dated 1 August 2015, the Player's employment contract was terminated by Apollon.
19. On or about 3 August 2015, Apollon uploaded to TMS the necessary instructions and documents for the transfer of the Player to Sampdoria. Sampdoria, however, took no steps to do so.
20. By various emails between 4 and 19 August 2015, Sampdoria confirmed that it had no non-European spaces for the Player but that it wished to respect its responsibilities or obligations, and proposed solutions by which it would make payments but the Player would be transferred to another club.
21. The Player accordingly left Sampdoria's training camp. In the meantime, Sampdoria acquired a number of other non-European players in the summer of 2015.

E. The proceedings before the FIFA PSC

22. On 18 January 2016, Apollon began proceedings before the FIFA Players' Status Committee ("PSC") claiming fees and bonuses under the Transfer Contract amounting to EUR 1,600,000.
23. Sampdoria defended those proceedings (case ref 16-00349/cpe) by relying on clause 6 of the Transfer Contract and contending that the condition therein, namely the release by FIGC of the registration as professional player of the Player, had never been fulfilled.
24. That defence succeeded and on 22 November 2016 the Single Judge of the FIFA PSC rendered its decision rejecting Apollon's claims against Sampdoria and ordering Apollon to pay the costs of the proceedings to FIFA ("the Decision").

25. The Decision was notified to Apollon on 5 April 2017.

III. THE PROCEEDINGS BEFORE CAS

26. On 25 April 2017, Apollon filed an appeal against the Decision before the Court of Arbitration for Sport (“CAS”) in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2017 edition, the “Code”).
27. On 26 May 2017, Apollon filed its Appeal Brief in accordance with Article R51 of the Code.
28. On 31 May 2017, the CAS Court Office notified the parties of the appointment of the Panel.
29. On 10 July 2017, Sampdoria filed its Answer in accordance with Article R55 of the Code.
30. On 14 August 2017, the CAS Court Office issued an Order of Procedure, subsequently countersigned by each of the parties by way of their confirmation.
31. The hearing in accordance with Article R57 of the Code took place on Tuesday 3 October 2017 in Lausanne, Switzerland.
32. The Panel was assisted by Mr William Sternheimer of CAS and was joined by the parties’ representatives namely:
- (a) Apollon’s legal counsel, Messrs Jan Kleiner and Marc Cavaliero, accompanied by Mr Udi Schochatovich, who called G. as a witness;
 - (b) Sampdoria’s legal counsel, Mr Stefano La Porta, who called Mr Antonio Romei (by telephone), Mr Ricardo Pecini and Mr Massimo Ienca as witnesses, assisted by an interpreter.
33. During the hearing, Apollon sought to adduce further documents going to whether copies of the Transfer Contract and draft Employment Agreement signed by the Player were sent to and received by Mr Pecini on behalf of Sampdoria by email on 23 March and/or 24 July 2015 (which Mr Pecini denied). This is referred to further below.
34. At the end of the hearing both parties confirmed that their rights to be heard had been fully respected.

IV. THE PARTIES’ SUBMISSIONS

35. The Panel has carefully considered all the parties’ submissions, and the following summary seeks to assist in the reasoning that follows, rather than repeating them comprehensively.

A. The Appellant

36. Apollon's main submissions may be summarised as follows:

- (a) CAS has jurisdiction by reason of the FIFA regulations under Article R47 of the Code and the club's further evidence was admissible under Article R56 of the Code;
- (b) the Transfer Contract was unconditional and clause 6 was not intended to have and was not given any legal effect by the parties, as demonstrated by their conduct and communications until August 2015, including a binding Employment Contract with the Player;
- (c) in any event, clause 6 is to be deemed fulfilled under Article 152 of the Swiss Code of Obligations ("SCO") and/or principles of good faith and *pacta sunt servanda* and/or *culpa in contrahendo* and/or *venire contra factum proprium*; or, if it failed, this resulted from Sampdoria's non-compliance with its obligations resulting in damage equivalent to the transfer fees under Article 156 of the SCO.

37. Apollon requested by way of relief that:

- (1) *the ... Decision ... be annulled;*
- (2) *UC Sampdoria ... be ordered to pay to Apollon Limassol the amount of EUR 1,040,000 and interest at ... 5% per annum ... on EUR 540,000 as from 19 August 2015 [and] EUR 500,000 as from 1 February 2016;*
- (3) *appropriate sporting sanctions ... be imposed on UC Sampdoria under Article 12 of [RSTP] ...;*
- (4) *UC Sampdoria ... bear the costs of the arbitration and ... to contribute to the legal fees incurred by the Appellant at an amount of at least CHF 3,000.*

B. The Respondent

38. Sampdoria's main submissions were, in summary, that:

- (a) the Transfer Contract was intended to be and was conditional on the registration of the Player as a professional player of Sampdoria under clause 6 and this did not occur;
- (b) the terms of the Transfer Contract and the conduct and communications between the parties regarding the Player were influenced by S. and the desire of Sampdoria's President to accommodate him;
- (c) Sampdoria itself did not wish to employ the Player, the Draft Employment Contract was a 2014/15 template and therefore no concluded Employment Contract between Sampdoria and the Player ever came into existence; and
- (d) Sampdoria always acted in good faith, including its offers to make payment on the Player moving elsewhere, and it was for the Player to obtain a European nationality in order to join Sampdoria without using one of its non-European spaces.

39. Sampdoria requested by way of relief that CAS:
- (a) reject the appeal or alternatively make no award of damages because of Apollon's contributory negligence;
 - (b) find the request for sporting sanctions inadmissible or ungrounded; and
 - (c) order Apollon to reimburse Sampdoria for all legal expenses including the arbitration costs.

V. JURISDICTION

40. Article R47 of the Code states:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body ...”.

41. Apollon relied on Article 58 para. 1 of the FIFA Statutes as conferring jurisdiction on CAS. The jurisdiction of CAS was not contested by Sampdoria and was confirmed by the parties' signatures to the Order of Procedure.
42. The Panel therefore finds that CAS has jurisdiction to deal with the present case.

VI. ADMISSIBILITY

43. Article R49 of the Code provides:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late”.

44. The Decision was notified to Apollon on 5 April 2017 and it filed its Statement of Appeal within the 21-day deadline specified in Article 58 of the FIFA Statutes. The Appeal filed by Apollon is accordingly admissible.
45. The Panel does not accede to Apollon's attempt during the hearing to adduce further documents regarding the Employment Contract, namely hard copies of the emails dated 23 March and 24 July 2015 referred to in paragraph 33 above.
46. The late production of these emails was contrary to the previous directions issued by the Panel and the OP. Moreover under Article R56 of the Code:

“Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional

circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer”.

47. In the present case the production of these alleged emails, after Apollon’s evidence at the hearing, was far too late and no exceptional circumstances justified such late production.
48. On the contrary (a) the issue as to what had happened regarding the Player’s proposed employment contract and whether he had returned a signed version of the template to Sampdoria had been raised from the outset; (b) absent Sampdoria’s acknowledgement and/or countersignature, the alleged emails did not decisively prove the conclusion of an Employment Contract; (c) examination of further evidence relating to the alleged emails at that stage would have been disruptive; and (c) that issue was in the event not significant to the Panel’s decision as set out in paragraph 61 below.
49. There was thus no reason and no risk of injustice in refusing Apollon’s application as regards those emails, and no justification for admitting them when produced so late.

VII. APPLICABLE LAW

50. Article R58 of the Code states:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

51. In the present case the applicable regulations are those of FIFA and, subsidiarily, the applicable law is Swiss law.

VIII. MERITS

A. The effect of clause 6

52. Clause 6 of the Transfer Contract refers to registration by FIGC rather than merely the issue of an ITC, but in any event there is no justification in this case to treat the Transfer Contract as indeed conditional and the condition as unsatisfied.
53. The relevant principles under Swiss law including Articles 18, 152 and 156 of the SCO, provide, among other things, that
 - (a) the content of a contract is established by subjective interpretation based on the true intentions of the parties, without regard to incorrect statements or manner of expression used by them; and
 - (b) until satisfaction of a condition precedent, the conditional obligor must refrain from

any act which might prevent performance of his or her obligation and the condition is deemed fulfilled if a party has prevented it by acting in bad faith.

54. As set out in paragraphs 8 and 9 above, the Transfer Contract clearly set out the obligations of the parties under clauses 3 to 5 to process the agreed transfer of the Player, and clause 6 did not derogate from those obligations but provided for an eventuality entirely outside their control which might prevent their agreed common goal.
55. The correspondence between the parties and the evidence as a whole also satisfies the Panel that the Transfer Contract was not intended to allow Sampdoria to avoid its obligations and payment by reason of the failure to obtain an ITC (or registration by FIOC).
56. Instead the parties assumed, rightly, that if they proceeded in accordance with their obligations an ITC could in due course be obtained but never reached that stage. In particular, it was for Sampdoria to make available and allocate to the Player one of its non-EU national places. Clause 6 cannot be interpreted as meaning that the Transfer Contract was conditional on its choice not to do so.

B. The conduct of the Parties

57. It is also clear that the absence of an ITC (or registration by FIGC) resulted from Sampdoria's decision not to proceed with the transfer. Whether its decision to enter into the Transfer Contract resulted from S.'s influence, Sampdoria assumed valid and binding obligations to proceed with the steps set out in clause 5 and there is no good excuse or justification for its failure to do so.
58. The Panel denies as without any merit or legal basis the submission that the Transfer Contract was intended to allow Sampdoria not to take the Player if it decided not to, depending on S.'s position or otherwise.
59. Whether Sampdoria's President wanted to assuage S., or its other officers to lessen tensions with him at any stage or stages, does not explain away the manifest intention of the parties to effect the transfer of the Player from Apollon to Sampdoria for the start of the 2015/16 football season.
60. In short, the Transfer Contract was a binding legal agreement in respect of which Sampdoria has failed to show any duress or other vitiating factor. The fact that it claimed that it would fulfill its 'responsibilities' and 'find a solution' for the Player, was because, although it did not use the language of admitting legal obligations, it was aware of its commitments and sought to assuage Apollon accordingly.

C. The Employment Contract and the Player's nationality

61. The Panel does not need to reach a finding as to whether Sampdoria received a signed Employment Contract on behalf of the Player. The fact that no countersigned Employment Contract came into existence is *nihil ad rem* given that the non-registration of the Player resulted

from Sampdoria's decision not to perform its obligations, in breach of the Transfer Contract.

62. The Panel also rejects the contention that it was for the Player to obtain a European nationality: this was only raised during the hearing, had no documentary support and without such was contrary to Sampdoria's emphasis on any available non-European spaces at its club for the 2014/15 and subsequent 2015/16 season.

D. Conclusions

63. The Panel finds that in the present case clause 6 was intended to apply if the absence or delay in registration was other than through Sampdoria's choice – especially when that choice presumed its non-compliance with its contractual obligations.
64. It is unnecessary in such circumstances to decide separately on Apollon's reliance as regards (a) Sampdoria's alleged bad faith and/or (b) the inferences to be drawn from Sampdoria's acknowledgement of its responsibilities in August 2015, which did more than support Apollon's main arguments as to the nugatory effect of clause 6.
65. Sampdoria was and is accordingly liable to pay Apollon the transfer fees agreed (a) because clause 6 did not operate to avoid or suspend the transfer by reason of the absence of registration in the circumstances and (b) the lack of registration resulted from Sampdoria's non-compliance with its obligations under clause 5 of the Transfer Contract and it is liable for Apollon's loss in the amount of those fees.
66. Apollon did not pursue any claim in respect of bonuses lost under the Transfer Contract but is entitled in the usual way (under FIFA's practices and Swiss law) to interest at 5% per annum on the two sums of EUR 500,000 to be awarded.
67. Sporting sanctions, at this stage and other than before FIFA, are inappropriate and the Appellant's request in this respect must be rejected.

E. The reimbursement of salary

68. As regards Apollon's claim to reimbursement of the Player's salary for February to May 2015 totalling EUR 40,000, there was no real argument before the Panel but nor was there any documentary or witness evidence to seek to establish that such or any salary for that period had in fact been defrayed by Apollon.
69. On the one hand, Apollon still employed the Player until 31 August 2015 and can be presumed to have paid his salary, so that when Sampdoria agreed in May to "reimburse" some (past) salary, it may not require any further proof from Apollon. And indeed Sampdoria did not argue the point.
70. On the other hand, the burden of satisfying the Panel that such reimbursement fell due under the letter of 19 May 2015 must be on Apollon and the Panel concludes that in the absence of any evidence, there is no alternative but to refuse that additional claim.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Apollon Limassol against the decision of the FIFA Players' Status Committee dated 22 November 2016 is partially upheld.
 2. The decision of the FIFA Players' Status Committee dated 22 November 2016 is set aside.
 3. UC Sampdoria is ordered to pay Apollon Limassol (a) the sum of EUR 500,000 and interest thereon at 5% per annum from 19 August 2015 and (b) the further sum of EUR 500,000 and interest thereon at 5% per annum from 1 February 2016.
- (...)
6. All and any other and further prayers and requests for relief are dismissed.